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No. 86-1756

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

HARRY R. CARLILE TRUST,
ZELDA ARTHURS, TRUSTEE,
Petitioner,

v.

COTTON PETROLEUM CORPORATION
AND THE OKLAHOMA CORPORATION
COMMISSION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OKLAHOMA

BRIEF IN OPPOSITION OF RESPONDENTS COTTON PETROLEUM CORPORATION AND OKLAHOMA CORPORATION COMMISSION TO PETITION FOR CERTIORARI

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June 3, 1987

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QUESTION PRESENTED

When a State Court upholds a collateral attack of a state agency order by rendering a new law-changing decision which overrules clear past precedent and which was not clearly foreshadowed, can the Court limit its ruling to future state agency hearings.

PARTIES TO THE PROCEEDING BELOW AND DESIGNATION OF CORPORATE RELATIONSHIPS

The caption of the case contains the names of all parties to the proceeding before the Oklahoma Supreme Court, however, the following entities participated as amici curiae:

Mobil Oil Corporation
Oklahoma Independent Petroleum Association
Phillips Petroleum Company
Sun Exploration & Production
Kerr McGee Corporation
Exxon Corporation
Cities Service Oil & Gas Corporation
Walker Oil Company, Inc.
Amoco Production Company
Bass Production Company
Tenneco Oil Company
Union Oil Company of California
Mustang Production Company
CNG Producing Company
Atlantic Richfield Company
Shell Western E & P, Inc.
Harry A. Spring
Robert J. Spring
Tom Spring
Roger Spring
D. B. Cladwell
Oaktree Petroleum Corporation
The Adaptable Tool Company
Anadarko Beach Exploration Company

Respondent, Cotton Petroleum Corporation, is a wholly owned subsidiary of United Energy Resources, Inc., which is a wholly owned subsidiary of MidCon Corp., which is a wholly owned subsidiary of Occidental Petroleum Corporation. To the best knowledge of Counsel the affiliates of Cotton Petroleum Corporation that may have securities in the hands of the public are as follows:

Occidental Petroleum Corporation
Occidental Chemical Holding Corp.
MidCon Corp.
Natural Gas Pipeline Corp. of America
IBP, Inc.
Oxy Chemical Properties Corporation
Occidental Chemical Properties Corporation
Island Creek Coal Company
Occidental Overseas Limited
IBP Properties, Inc.
Kentucky-Ohio Transportation Co.
Cities Service Company
Occidental International Finance N.V.
Curtis Bay Company
Hooker Chemical Properties Corporation
OxyChem Properties Corporation
Hooker Chemical Corporation
Occidental Chemical Corporation
Occidental Electrochemicals Corporation
United Energy Resources, Inc.
United Gas Pipeline Company

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STATUTORY PROVISIONS INVOLVED

OKLA. STAT. tit. 52 §87.1(a):

Whenever the production from any common source of supply of oil or natural gas in this state can be obtained only under conditions constituting waste or drainage not compensated by counterdrainage, then any person having the right to drill into and produce from such common source of supply may, except as otherwise authorized or in this section provided, take therefrom only such proportion of the oil or natural gas that may be produced therefrom without waste or without such drainage as the productive

capacity of the well or wells of any such person considered with the acreage properly assignable to each such well bears to the total productive capacities of the wells in such common source of supply considered with the acreage properly assignable to each well therein.

(a) To prevent or to assist in preventing the various types of waste of oil or gas prohibited by statute, or any of said wastes, or to protect or assist in protecting the correlative rights of interested parties, the Corporation Commission, upon a proper application and notice given as hereinafter provided, and after a hearing as provided in said notice, shall have the power to establish well spacing and drilling units of specified and approximately uniform size and shape covering any common source of supply, or prospective common source of supply, of oil or gas within the State of Oklahoma; provided, that the Commission may authorize the drilling of an additional well or wells on any spacing and drilling unit or units or any portion or portions thereof or may establish, reestablish, or reform well spacing and drilling units of different sizes and shapes when the Commission determines that a common source of supply contains predominantly oil underlying an area or areas and contains predominantly gas underlying a different area or areas; provided further that the units in the predominantly oil area or areas shall be of approximately uniform size and shape, and the units in the predominantly gas area or areas shall be of approximately uniform size and shape, except that the units in the gas area or areas may be of nonuniform size and shape when they adjoin the units in the oil area or areas; provided further that the drilling pattern for such nonuniform units need not be uniform, and provided further that the Commission shall adjust the allowable production within said common source of supply, or any part thereof, and take such other action as may be necessary to protect the rights of interested parties. Any order issued pursuant to the provisions hereof may be entered after a hearing upon the petition of any person owning an interest in the minerals in lands embraced

within such common source of supply, or the right to drill a well for oil or gas on the lands embraced within such common source of supply, or on the petition of the Conservation Officer of the State of Oklahoma. When such a petition is filed with the Commission, the Commission shall give at least fifteen days' notice of the hearing to be held upon such petition by one publication, at least fifteen (15) days prior to the hearing, in some newspaper of general circulation printed in Oklahoma City, Oklahoma, and by one publication, at least fifteen (15) days prior to the date of the hearing, in some newspaper printed in the county, or in each county, if there be more than one, in which the lands embraced within the application are situated. Except as to the notice of hearing on such petition, the procedural requirements of Sections 86.1 et seq. of this title, shall govern all proceedings and hearings provided for by this section.

STATEMENT OF THE CASE

With regard to the production of minerals Oklahoma follows the *Rule of Capture*; the owner of mineral rights underneath a tract of land ordinarily owns any oil or gas produced through a well drilled on that tract. It makes no difference whether the oil and gas so produced originally underlaid his property or that of his neighbors; whoever reduces the hydrocarbons to possession is the owner. This necessarily encourages each owner to drill his own well and produce it as rapidly as possible, thus tending to result in the drilling of more wells than necessary and production at a rate which decreases ultimate total recovery.

To prevent the waste associated with exploration and production under the *Rule of Capture* while protecting the rights *inter sese* of mineral interest owners, Oklahoma enacted a comprehensive scheme for the regulation of oil and gas production and exploration. In 1947 the Legislature of the State of Oklahoma passed the *Oklahoma Well Spacing Act* which authorizes the Oklahoma Corporation

Commission ("Commission") to establish drilling and spacing units for the production of oil and gas. The Commission is only required to give notice by publication prior to spacing nonproducing minerals.

Once a drilling and spacing unit has been established, a proportionate share of production from any well therein is allocated to all separate mineral interest owners in the unit. Oil and gas leases, including the one involved herein, typically are made for a set term of years (the primary term) plus as long thereafter as oil or gas is produced from the leased premises in paying quantities. Since production from a unit well is treated legally as if it had been produced from each separately owned tract within a drilling and spacing unit, such unit well production serves to extend the life of all leases within the unit for as long as it continues.

On August 27, 1974, Monsanto Company, a party unrelated to this controversy, filed an application with the Commission to create 640 acre drilling and spacing units for gas and gas condensate produced from the Springer and several other common sources of supply underlying Section 14, Township 11 North, Range 11 West, Caddo County, Oklahoma, and seventeen other surrounding sections in the same common source of supply. Pursuant to the Oklahoma Well Spacing Act, 52 OKLA. STAT. §87.1(a), notice of the aforementioned spacing application was given by one publication at least fifteen (15) days prior to its hearing in a newspaper of general circulation printed in Oklahoma County, and by one publication at least fifteen (15) days prior to its hearing in a newspaper of general circulation printed in Caddo County, Oklahoma. No other notice was given to the Petitioner or her predecessor in title.

Pursuant to the notice, the Commission heard Monsanto Company's application on September 17, 1974, and issued Order No. 107773 on September 24, 1974, granting Monsanto Company's application, thereby creating a 640 acre drilling and spacing unit for gas and gas condensate from the Springer formation underlying Section 14, Town-

ship 11 North, Range 11 West, Caddo County, Oklahoma.

On June 28, 1978, predecessors in title to the Petitioner ("Carlile") executed an oil and gas lease covering the NW/4 and W/2 SW/4 of Section 14, Township 11 North, Range 11 West, Caddo County, Oklahoma. Said lease was for a primary term of four years from August 13, 1978, and as long thereafter as oil or gas is produced. The Respondent, Cotton Petroleum Corporation ("Cotton") commenced drilling operations in Section 14 within the primary term of the lease and continued diligent drilling operations until a well capable of producing gas and gas condensate from the Springer formation was completed. The exact location of the well is at a point 2,365 feet from the south line and 1,520 feet from the west line of Section 14, being outside of the area covered by Carlile's lease, but within the 640 acre drilling and spacing unit established by Commission order.

On August 13, 1982, Carlile top leased the same acreage to Midland Oil Company, a party unrelated to this action. As bonus for the lease, Carlile received a draft for $120,240.00 payable upon the lease of Cotton being judicially terminated. On September 28, 1982, Carlile filed its Petition in Caddo County District Court to cancel Cotton's lease, alleging Carlile to be the owner of the following real property, to-wit: NW/4 and W/2 SW/4 of Section 14, Township 11 North, Range 11 West, Caddo County, Oklahoma; further alleging in general terms that Cotton had no right, title or interest in the property.

On March 4, 1983, Cotton filed its Motion for Summary Judgment and Brief in support thereof alleging that no substantial controversy existed, and attached to said motion as exhibits, a copy of the lease in dispute, an affidavit and a certified copy of Commission Order No. 107773.

On July 26, 1983, Carlile filed its Motion for Summary Judgment and Brief in support thereof alleging that the Commission Order establishing the 640-acre unit was void since publication notice alone is constitutionally deficient.

On August 17, 1983, the District Court granted Carlile's Motion for Summary Judgment, denied Cotton's Motion for Summary Judgment, quieted Carlile's title and barred Cotton from asserting any right, claim, lease or interest in the property.

On September 27, 1983, Cotton filed its appeal with the Oklahoma Supreme Court raising as error the District Court's ruling that publication notice to mineral owners does not meet the minimum standards of due process in Commission hearings which seek to establish drilling and spacing units for common sources of supply underlying lands on which no oil or gas is being produced nor any well has been commenced.

On October 24, 1983, the Commission was granted leave to intervene as an appellant in the cause pursuant to motion of October 17, 1983.

The Oklahoma Supreme Court ultimately held that significant property rights are affected by the formation of drilling and spacing units even when nonproducing mineral interests are sought to be embraced within the proposed units, thereby constitutionally entitling interest owners to notice reasonably calculated to apprise them of proceedings to be conducted. The Oklahoma Supreme Court went on to decide that this new rule would have prospective application only. In its decision the Court noted that the resolution of the constitutional issue reached in the case was *not clearly foreshadowed*. The Court further noted that Carlile had made a *collateral attack* rather than a direct appeal of the spacing order issued by the Oklahoma Corporation Commission in 1974. The Court also noted that the *new* constitutional rule being announced did not operate to condemn a prior course of conduct pursued by a private party-litigant, rather it corrected a defective agency process of long standing which had received extended and certain statutory sanction, and that the spacing order in contention was not procured or caused to be procured by Cotton or anyone in privity with Cotton.

Pursuant to a motion of the Commission to stay

issuance of mandate, the Oklahoma Supreme Court, on February 23, 1987, issued its order staying the effectiveness of the mandate "for ninety (90) days from the date hereof, in order to afford the parties an opportunity to seek a writ of certiorari in the Supreme Court of the United States, and if such proceedings be instituted, the stay shall continue until their conclusion, or until further order of this Court". Carlile now seeks certiorari for a review of that portion of the Oklahoma Supreme Court's decision which limited its application to future spacing hearings conducted by the Commission.

ARGUMENT

1. THE PROSPECTIVE APPLICATION OF A NEW PRINCIPLE OF LAW WAS PROPER

This Court has long held that the Constitution does not require the retroactive application of judicial decisions. *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932). The Court should weigh the merits and demerits in each case by looking to the prior history of the rule in question. *Linkletter v. Walker*, 381 U.S. 618 (1965). There is ample basis for a holding of nonretroactivity if a decision could produce substantial inequitable results if applied retroactively. *Cipriano v. City of Houma*, 395 U.S. 701 (1969).

In the case of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) this Court set out three elements which sould be reviewed:

> "In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has

> been stressed that 'we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity'." *Chevron Oil Co. v. Huson, supra*, at 106-107. *footnotes omitted*

In this instance all three factors cited by the Court in *Huson* have been met. *See* Appendix to Petition For a Writ of Certiorari at 15a - 21a.

2. THE LEGAL AUTHORITIES CITED IN THE PETITIONER'S PETITION FOR A WRIT OF CERTIORARI DO NOT APPLY TO THIS FACT SITUATION

In support of its position Carlile has cited the case of *Shea v. Louisiana*, 470 U.S. 51 (1985). Respondents, respectfully dispute the relevance of said case to the present fact situation. As the Court will recall *Shea* involved the applicability of *Edwards v. Arizona* 451 U.S. 477 (1981) to cases pending and undecided on direct appeal. In *Edwards* this Court held that a criminal defendant's rights under the Fifth and Fourteenth Amendments were violated by the use of his confession obtained by police instigated interrogation without counsel present after the defendant had requested an attorney. In 1979 Kevin Michael Shea was charged with armed robbery and latter convicted based partially upon a confession given in violation of the standards set down by *Edwards* two years later. In a motion to suppress, Shea had continually raised the issue of the trial court's error in admitting the confession into evidence. This Court ruled that the *Edwards* decision was binding on all cases

pending on direct review and overturned the conviction. *Shea* did not abolish the distinction between cases brought to this Court by way of direct appeal and those coming by way of collateral attack, as alleged in Carlile's Petition For a Writ of Certiorari.

In the present situation Carlile collaterally attacked a state agency order issued eight years prior to the filing of Carlile's action. Carlile is not directly appealing the spacing order, nor was there a ruling issued during the pendency of this action which overturned either that spacing order or a similarly issued spacing order.

Assuming arguendo that *Shea* is similar to the present fact situation in certain respects, Carlile is incorrect when she states that the changes mandated by the Oklahoma Supreme Court in this action were *foreshadowed*. In its opinion the Oklahoma Supreme Court's specifically held that its ruling was not clearly foreshadowed. If all three factors set out in *Chevron Oil Co. v. Huson, supra*, are analyzed, as was done by the Supreme Court of Oklahoma in its decision, it is clear that nonretroactivity was proper.

This issue which Carlile seeks to have reviewed is limited to her alone. There is no public interest which would be affected by this Court granting certiorari. In a companion case, No. 86-1770, the Oklahoma Corporation Commission is now petitioning for a Writ of Certiorari which asks this Court to review the entire decision of the Oklahoma Supreme Court being considered herein. Respondents assert that the Petition For a Writ of Certiorari filed by the Oklahoma Corporation Commission involves matters of greater import and more widespread general impact than the issues raised in this Petition For a Writ of Certiorari.

CONCLUSION

For the foregoing reasons, respondents, Cotton Petroleum Corporation and Oklahoma Corporation Commission, urge that the Petition For a Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of this Brief in Opposition to the Petition for Writ of Certiorari were mailed to the person listed below on the 3rd day of June, 1987, by placing same in the U.S. Mail with postage fully prepaid.

All parties required to be served have been served.

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